United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Affidavit

75-4229, 51

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75-4229, 75-4251

GUAN CHOW TOK,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PAK SUEN STEPHEN LAI,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

ROBERT B. FISKE, JR.,
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THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys, Of Counsel.

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RESPONDENT'S BRIEF

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105(a) the petitioners, Guan Chow Tok (hereinafter referred to as "Tok"), and Pak Suen Stephen Lai (hereinafter referred to as "Lai") petition this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on September 12, 1975. That order dismissed an appeal from a decision of an Immigration Judge in which he found the petitioners deportable as aliens who had been convicted of a viola-

tion of law relating to the possession and distribution of narcotics.

Tok filed his petition for review on October 24, 1975. Lai filed his petition on November 20, 1975. Because both cases raised identical issues of law in the proceedings below, the petitions were consolidated by stipulation and order of this Court dated January 30, 1976.

Statement of Facts

Guan Chow Tok

The petitioner, Guan Chow Tok, is an alien, a native and citizen of China who was admitted to the United States for lawful permanent residence on June 11, 1969.

On January 3, 1973, after a trial by jury and a verdict of guilty in the United States District Court for the Southern District of New York, Tok was convicted of conspiring to violate Sections 812, 841(a)(1), 841(b)(1)(A) of Title 21, United States Code, and of unlawfully, intentionally, and knowingly distributing and possessing with intent to distribute a Schedule I narcotic drug controlled substance to wit: twenty pounds of heroin in violation of Title 21, Section 812, 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2. As a result of his conviction Tok was sentenced to imprisonment for a period of seven years on two counts of the indictment to run concurrently and pursuant to 21 U.S.C. § 841 was placed on special parole for a term of three years to commence upon the expiration of confinement (T. 11).*

On March 29, 1973 the Immigration Naturalization Service (the "Service") commenced deportation proceedings against Tok by the issuance of an order to show cause and notice of hearing charging that he was de-

* References preceded by the letter "T" refer to the tab numbers and pages in the certified administrative record pertaining to Tok, which was filed in this Court.

portable under Section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11) (T. 12). At a deportation hearing on November 21, 1974 before Immigration Judge Joseph W. Monsanto, Tok, by his attorney conceded the factual allegations contained in the order to show cause with the exception of allegation #2 relating to the country of his citizenship. During the hearing Tok's counsel moved that deportation proceedings in his case be terminated or that an order of deportation not be entered. The basis of Tok's argument was that there were substantial equities in his particular case and that because of these alleged equities the Immigration Judge, in his discretion, could withhold an order of deportation or stay the execution of a deportation order (T. 10, p. 7). Alternatively, Tok argued that the imposition of an order of deportation in his case constituted cruel and unusual punishment under the Eighth Amendment and a denial of equal protection under the Fourth Amendment of the United States Constitution (T. 10, p. 16). At the close of the deportation hearing the Immigration Judge entered a decision ordering that Tok be deported to Taiwan and denied his motion to terminate the proceedings (T. 8).

On November 25, 1974 Tok appealed that decision to the Board of Immigration Appeals alleging that the Immigration Judge improperly declined to exercise his discretion by ordering his deportation. Tok also renewed his claim that his deportation was a denial of equal protection and cruel and unusual punishment under the United States Constitution (T. 6, 7).

On September 12, 1975 the Board of Immigration Appeals dismissed the alien's appeal and affirmed the decision of the Immigration Judge (T. 1).* In its decision the Board stated that the discretionary authority

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* The administrative appeals of petitioners Tok and Lai were consolidated before the Board which has issued a joint decision in these cases.

of the Attorney General lies in his power to institute or refrain from the institution of deportation proceedings. That discretionary authority relates to the prosecutional functions of the Attorney General which had been delegated by him, pursuant to regulations, to the various district directors and other Service officials described in 8 C.F.R. § 242.1(a). The Board further stated that once the decision to institute proceedings had been entered it was not within the province of the Immigration Judge or the Board to review the wisdom of that decision, but rather their function was to determine whether the deportation charges are sustained by the requisite evidence. The Board also noted that it did not have jurisdiction to reach the constitutional arguments presented by the petitioner.

Pak Suen Stephen Lai

The petitioner, Pak Suen Stephen Lai, is a native of Hong Kong and a citizen of the United Kingdom and Colonies who was admitted for lawful permanent residence in the United States on December 7, 1970.

On his plea of guilty Lai was convicted in the United States District Court for the Southern District of New York for the offense of unlawfully, intentionally and knowingly possessing with intent to distribute a Schedule I narcotic drug controlled substance, to wit: approximately 144.5 grams of heroin in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A), and of conspiracy to commit that act under 21 U.S.C. § 846. Lai was sentenced to incarceration for a period of eighteen months and pursuant to 21 U.S.C. § 841 was placed on special parole at the expiration of his confinement for a period of three years (L. 11).*

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* References preceded by the letter "L" refer to the tab numbers and pages in the certified administrative record which was filed with this Court.

On July 5, 1973 the Immigration and Naturalization Service commenced deportation proceedings against Lai by the issuance of an order to show cause and notice of hearing charging Lai was deportable under Section 241(a)(11) by reason of his narcotics conviction on April 24, 1973. On February 7, 1975, Lai appeared with his counsel at a deportation hearing before Immigration Judge Howard I. Cohen. During the hearing Lai conceded the factual allegations contained in the order to show cause but declined to concede his deportability (L. 8, p. 6-8). At the commencement of the hearing Lai's counsel moved to adjourn the hearing on the ground that he was "exploring the possibility" of obtaining non-priority status for his client (L. 8, p. 3-4). The Immigration Judge declined to adjourn the hearing on that ground stating that the authority to grant such a status was within the sole province of the District Director and not within that of the administrative judge. In addition he stated that the deportation hearing did not preclude the alien from pursuing that form of relief with the District Director and, in fact, an adjudication of Lai's deportability might be desired by the District Director prior to consideration of the alien's request (L. 8, p. 4).*

As in the deportation proceedings relating to Tok, Lai's counsel moved to terminate the deportation proceedings on the grounds that the Immigration Judge had the general authority to grant that relief. Despite the Immigration Judge's request, Lai's counsel could not relate a specific regulation or statute granting him that authority. Also, as in Tok's proceeding, the alien's coun-

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* Lai also sought to adjourn the proceeding upon the representation that the conviction was subject to attack and that counsel sought to file a motion for a writ of coram nobis to vacate that conviction. It appears that Lai did not pursue this action.

sel argued that Lai's deportation would be in violation of his right to equal protection under the United States Constitution or, alternatively, would constitute cruel and unusual punishment. Over the strenuous and continuous objections of the Service's trial attorney, the Immigration Judge permitted Lai to testify as to the equities in his case solely for the purpose of creating a record which could be reviewed by the District Director in the event he wished to consider Lai's case for non-priority status (L. 8, pp. 12, 1; L. 7). At the close of the hearing the Immigration Judge rendered a decision finding the alien deportable by reason of his narcotics conviction and denied his application to terminate the proceedings (L. 7).

On February 14, 1975 Lai appealed the decision of the Immigration Judge to the Board of Immigration Appeals. In his appeal Lai raised the same issues claimed by Tok in his appeal to the Board with the addition of an estoppel argument based on an alleged breach of agreement between the Service and the alien (L. 3). On September 12, 1975 the Board rendered its decision in the case of both petitioners. In its decision the Board dismissed the claims proferred by both petitioners relating to the alleged constitutional infirmities in the proceedings and the availability of discretionary relief. In addition the Board dismissed Lai's estoppel argument stating that there was no evidence in the record that the Service had promised him that he would not be deported as a result of his alleged cooperation.

ARGUMENT

POINT I

The order of the Board of Immigration Appeals finding the petitioners deportable under Section 241 (a)(11) of the Act by reason of their heroin convictions does not offend the equal protection clause of the United States constitution.

Section 241(a)(11) of the Act provides that any alien shall be deported who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana. While an alien convicted of other criminal offenses may be relieved of the deportation consequences of a conviction by virtue of the provisions of Section 241(b) of the Act, Congress has expressly excluded drug offenders from certain ameliorative provisions of the Act including Section 241(b). The petitioners contend that to order their deportation under Section 241(a)(1) by reason of their heroin convictions without considering the equities in their individual cases denies them equal protection of the law in that *citizens* of the United States who are convicted of the identical offense have no "additional penalty" imposed upon them and *other aliens* who are deportable on different grounds under Section 241(a) are afforded discretionary relief which is not available to the petitioners. It is submitted that the petitioners' claim is without merit.

Judicial review of immigration laws (which appear to permit immigration to the United States essentially as a matter of congressional and executive grace and which to a large extent involve political decisions touching on our foreign affairs) does not require the same rigorous constitutional scrutiny as does local law which

discriminates against lawfully admitted and remaining immigrants. Thus, the Supreme Court in *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 418-19 (1948) stated:

> "It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living. The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization and the terms and conditions of their naturalization."

The Supreme Court has said that the fabric of our law had required of immigration statutes only that they comply in their application with procedural due process. The Supreme Court has not felt compelled to re-legislate the immigration laws to impose its own notions of substantive due process upon Congress. Thus, in *Galvan* v. *Press*, 347 U.S. 522 (1954), Mr. Justice Frankfurter stated:

> "In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . .
>
> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history', . . . but a whole volume.

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."

The Courts have consistently adhered to the proposition and held without exception that Congress is vested with the plenary power to make rules for the admission of aliens and to proscribe the terms upon which they may remain in the United States. See *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972); *Galvan* v. *Press*, *supra*. Further, even in cases where there existed a strong temptation to rule otherwise, the Courts have consistently reaffirmed earlier pronouncements that the validity of the distinctions drawn by Congress with respect to deportability is not a proper subject for judicial concern. *Bronsztejn* v. *Immigration and Naturalization Service*, 526 F.2d 1290, 1291 (2d Cir. 1975); *Oliver* v. *Department of Justice*, 517 F.2d 426, 428 (2d Cir. 1975).

If the substantive due process concept of equal protection is applicable at all to immigration statutes in some surgical manner in order to remove that which has been "firmly imbedded in the legislative and judicial tissues of our body politic," the statutory distinctions made therein must be upheld "if any state of facts rea-

sonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961).*

The distinction under attack by appellant is whether in the context of an immigration law, Congress may treat narcotics offenses more inflexibly than other forms of criminal behavior in determining to deport an alien. It is respectfully submitted that disparate treatment afforded aliens convicted of narcotics offenses and those convicted of other criminal offenses (or who are deportable by reason of the other provisions of Section 241(a)) does not offend the equal protection clause of the United States Constitution. See *Oliver* v. *Department of Justice*, *supra*, at 428.

The Congressional rationale behind the classification created by Section 241(a)(11) is based upon a strong national policy of deportation of aliens involved in narcotics traffic. Since 1922 statutes have provided for expulsion of narcotics offenders.** However, before 1952 these directions were found in legislation not directly integrated with the immigration laws.*** The Act of 1952 ****

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* In reviewing the application of immigration statutes to individual cases by the Board of Immigration Appeals and the Immigration and Naturalization Service this Court has applied a minimal scrutiny test where the distinctions between different classes of persons must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly situated shall be treated alike. See *Francis* v. *Immigration and Naturalization Service*, Docket No. 74-2245 (2d Cir. March 9, 1975).

** Act of May 26, 1922, 42 Stat. 596.

*** Sec. 241(a)(14), Act of 1952, 8 U.S.C. § 1251(a)(14).

**** Sec. 241(a)(11), Act of 1952, 8 U.S.C. § 1251(a)(11).

codified and expanded these legislative edicts and they were further amplified by the Narcotics Control Act of 1956.*

A number of considerations should be noted which indicate that Congress intended to formulate a stringent policy of deportation with respect to narcotics addicts and narcotics offenders. First, unlike the prior law, the 1952 Act requires deportation of narcotics addicts, even though they have committed no crime and, apparently, even though they are later cured. Secondly, the addict is the only narcotics offender who is deportable without regard to criminal violation. Third, the statute retroactively applies to narcotics convictions in the United States at any time prior to its enactment. Fourth, the 1956 amendments increased the severity of the deportation directives by specifically making them applicable to those convicted for possessing narcotics and for conspiracy to violate the narcotics laws.

Lastly, but of particular significance to this case, a 1956 amendment directed that the provisions for alleviating deportability by a pardon or timely court recommendation against deportation were inapplicable to aliens deportable upon conviction for narcotics violations.** Before the 1952 Act the Courts ruled that a timely judicial recommendation precluded deportation. These rulings were followed after the 1952 Act became effective. The 1956 amendment was designed to overcome these holdings by including language in Section 241(b) to state clearly that the provision does not permit judicial recommendation against the deportation of an alien convicted of a narcotics offense.

Thus, the history of the immigration statute clearly demonstrates that Congress intended a stringent policy

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* Sec. 301, Act of July 18, 1956, 70 Stat. 575.
** Sec. 301, Act of July 18, 1956, 70 Stat. 575.

of deportation of narcotics addicts and narcotics offenders. This stringent Congressional policy against aliens convicted of narcotics offenses has been reviewed by the Courts and that statutory scheme which mandates deportation under Section 241(a)(11) of the Act has withstood Constitutional attacks despite the explicit exclusion of discretionary relief under the immigration act. See *Oliver, supra.*

Furthermore, the petitioners' contention that their deportation violates the Fifth Amendment because it places an "additional penalty" on them that is not imposed on *citizen* offenders is equally without merit. This argument completely ignores the above-mentioned Congressional power to proscribe the conditions of an alien's residence in the United States. Furthermore, their argument that deportation is an *additional penalty* imposed on an alien narcotics offender is merely an attempt to circumvent previous Court decisions which have explicitly stated that deportation is no punishment within the meaning of the double jeopardy clause. *Oliver, supra* at 428. Despite its consequences, the Courts have consistently adhered to the view that deportation, being a civil procedure, is not punishment for a crime. See *Santelises* v. *Immigration and Naturalization Service,* 491 F.2d 1254 (2d Cir. 1974); *Buckley* v. *Gibney,* 332 F. Supp. 790 (S.D.N.Y.), *aff'd on opinion below,* 449 F.2d 1305 (2d Cir. 1971), *cert. denied,* 405 U.S. 915 (1972); *Cortez* v. *Immigration and Naturalization Service,* 395 F.2d 965 (5th Cir. 1968); *United States ex rel. Circella* v. *Sahli,* 216 F.2d 33 (7th Cir. 1954), *cert. denied,* 348 U.S. 965 (1955).

It is therefore submitted that neither the mandatory deportation provisions of Section 241(a)(11) of the Act, nor the obvious absence of deportation consequences to citizen narcotics offenders violates the Equal Protection Clause as applied in this case.

POINT II

Neither the Immigration and Nationality Act nor the regulations adopted by the Attorney General pursuant thereto bestow upon the Board of Immigration appeals or the immigration judges the authority to grant discretionary relief to the petitioners.

The petitioners also contend that the refusal of the Board and the respective Immigration Judges to consider the equities in their cases and terminates the proceedings (or alternatively grant the equivalent of non-priority status)* was an abuse of discretion. It is respectfully submitted that the petitioner's argument completely ignores the required separation of prosecutional and quasi-judicial aspects of a deportation proceeding, and is also contrary to the explicit grants of delegated authority contained in Title 8 of the Code of Federal Regulations.**

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* Non-priority status is described in the Service's Internal Operations Instructions adopted pursuant to the Attorney General's broad grant of authority under Section 103 of the Act, 8 U.S.C. § 1103. That instruction specifically delegates to the various *district directors* the sole responsibility to recommend an individual case for non-priority treatment. This recommendation in turn is forwarded to the respective *Regional Commissioners.* Contrary to the petitioners' contention, this narrow and explicit grant of discretionary authority is delegated solely to the District Directors and the Regional Commissioners. As indicated at Lai's deportation hearing (L. 8, p. 5) even petitioner's counsel was at a loss when asked to specify the statute or regulation which delegates such a power to the Immigration Judge.

** As the Board indicated in its opinion under 8 C.F.R. § 242.1, a proceeding to determine the deportability of an alien is commenced by the issuance of an order to show cause. The authority to institute these proceedings and issue these orders is solely delegated to the various district directors. See *Matter*

[Footnote continued on following page]

The petitioners rely upon the decisions in *United States* v. *Follette*, 272 F. Supp. 563 (S.D.N.Y. 1967) and *United States* v. *Santelises*, 476 F.2d 787 (2d Cir. 1973) to support their assertion that the Board and the Immigration Judges have a broad and undefined general power to grant discretionary relief in meritorious deportation cases.* As previously stated the all encompassing authority proposed by the petitioners is contrary to the carefully delineated lines of authority stated in the pertinent regulations.

In *Santelises*, this Court reviewed an appeal from the denial of the District Court to vacate a plea of guilty on the ground that the indictment did not charge an offense and that the plea was involuntary. In discussing

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of Merced, Interim Decision 2273 (B.I.A. 1974); *Matter of Gallares*, Interim Decision 2177 (B.I.A. 1972); *Matter of Geronimo*, 13 I. & N. Dec. 680 (B.I.A. 1971). Similarly deportation proceedings can be terminated as "improvidently begun" only upon motion of the District Director. See *Matter of Vizcarra-Delgadillo*, 13 I. & N. Dec. 51 (B.I.A. 1968) citing *Pignetello* v. *Attorney General*, 350 F.2d 719 (2d Cir. 1965). On the other hand the Board and the immigration judges are specifically excluded from this aspect of the deportation proceeding. As the Board stated in its decision in this matter their function, and the function of the immigration judge, is to determine whether the deportation charges are supported by the requisite evidence. See 8 C.F.R. § 242.8 and 8 C.F.R. § 3.1.

* The petitioners also rely upon *Lieggi* v. *I.N.S.*, 389 F. Supp. 12 (N.D. Ill. 1975) in support of their theory that the Federal Constitution precludes deportation in meritorious or hardship cases. We note that the Court of Appeals for the Seventh Circuit reversed that decision on January 27, 1976. Furthermore, although the consequences of deportation may be drastic in individual case (see Petitioners' brief, p. 21 citing *Lennon* v. *I.N.S.*, 527 F.2d 187 (2d Cir. 1975), the *Lennon* decision explicitly emphasized Congressional concern about those aliens, like the petitioners, who are traffickers in narcotic drugs. As the *Lennon* Court stated "our holding will not, of course, give any comfort to those convicted in the United States of drug violations." *Lennon* at p. 194.

the issue of voluntariness the Court noted in dicta that deportation was not an "automatic" consequence under 18 U.S.C. § 1546 in that deportation results only upon the *order* of the Attorney General who retains discretion whether or not to *institute* such proceedings. *Santelises* at p. 790. Contrary to the petitioners' contention that this language substantiates the existence of an unspecified and general grant of discretionary authority, the Court in *Santelises* was obviously referring to the Attorney General's specific grant of authority contained in 8 C.F.R. § 242.1 to *commence* deportation proceedings by the issuance of an *order* to show cause. Likewise, in *Follette* where a United States citizen sought to compel the Service to institute deportation proceeding and remove the plaintiff to Cuba, the discretionary power discussed by the Court was the prosecutional function of the district director. Neither of the cases relied upon by the petitioners support their theory that a general power has been delegated to the Immigration Judge, whereby he can terminate a deportation proceeding, refrain from rendering a decision as to deportability, or grant nonpriority status to an alien to whom deportation is mandatory under Section 241(a)(11) and 241(b) of the Act. The inherent general power described by the petitioners would not only be inconsistent with the "applicable provisions of law and regulations" but it would far beyond the limited powers "conferred on the Special Inquiry Officers by the Act". See 8 C.F.R. 242.8(a).

POINT III

The Board of Immigration Appeals properly concluded that there was no evidence in the record establishing that the Service promised the aliens they would not be deported in return for their cooperation in other criminal proceedings.

The petitioners also seek to avoid mandatory deportation under Section 241(a)(11) of the Act by alleging that various officials in the federal government made entered into an agreement to help the petitioners avoid deportation if they cooperated with the government in other pending criminal investigations. Both Tok and Lai contend that the Service is estopped from deporting them by virtue of that alleged promise. In rendering its decision the Board stated that there was no evidence in the record to establish that any promise had been made to Lai.* In their brief to this Court the petitioners claim that such a promise was established (Petitioners' Brief, pp. 8-9). It is submitted that the glowing and detailed account of Lai's cooperation and the alleged promise, as recounted in pages 8-9 of the petitioners' brief, is

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* We note that Tok did not raise this issue at his deportation hearing (T. 10) nor in his appeal to the Board (T. 6). In fact, during the oral argument before the Board, counsel for both petitioners specifically noted that this estoppel argument was relevant only to Lai (T. 4, p. 5). In view of the fact that Tok is merely trying to ride on the coattails of Lai's argument he should not be permitted to raise this issue for the first time before this Court. See also *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1954); *N.L.R.B.* v. *Newton-New Haven Co.*, 506 F.2d 1035 (2d Cir. 1974); *K.F.C. National Management Corp.* v. *N.L.R.B.*, 497 F.2d 298 (2d Cir. 1974); *D.C. Transit Systems Inc.* v. *Washington Metropolitan Area*, 466 F.2d 394, *cert. denied*, 409 U.S. 1086.

not supported by Lai's testimony at the hearing on February 7, 1975 (L. 8). Rather the record reflects a not atypical effort by a defendant to reduce the consequences of his crime.

With respect to Lai's alleged cooperation prior to his conviction the record reflects that in return for Lai's cooperation prior to his conviction, Lai's bond was reduced and he was given a minimal period of incarceration (L. 8, pp. 17-19, L. 15). In addition and in reference to his alleged cooperation with government officials upon his release from imprisonment (L. 8, pp. 20-22), Lai only testified that he cooperated with certain named investigators. Nowhere in the record is there testimony that Lai (or Tok) received a promise by the Service or any other agency that in return for such alleged cooperation the alien would not be deported. In fact counsel's representations to the Board (T. 4, pp. 5-8) and to the Immigration Judge (L. 8, pp. 3-4) indicate the contrary. The record reflects that Lai was merely attempting to use his alleged cooperation as a bargaining tool to persuade the District Director to grant him the extraordinary and discretionary privilege of non-priority status.*

Furthermore, the record reflects that Lai did not offer any affidavits or documentation to substantiate his uncorroborated testimony. Compare *Geisser* v. *United States*, 513 F.2d 862 (5th Cir. 1975). Nor did Lai even attempt to have those investigators called at the hearing

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* We note that none of the Service investigators nor investigators from any other agency have the authority to promise or grant non-priority status to the petitioners. Operations Instructions 103.1(a)(1)(ii). At best those persons named by Lai at his hearing on February 7, 1975 could only inform the District Director as to any actual cooperation by the aliens.

to testify as to the nature of this alleged agreement.* It is therefore submitted that no evidence of a bargain has been established in this record.

Nevertheless, assuming arguendo, that a promise had been made to help him avoid deportation between the investigators and the petitioners it is respectfully submitted that such an agreement would not estop the United States from ordering the deportation of Tok and Lai. The United States is not bound by the unauthorized acts of its agents nor is it estopped from asserting lack of authority as a defense; further those persons dealing with the Government must be held to have notice of the limitations of an agent's authority. See *Wilbur National Bank* v. *United States*, 294 U.S. 120, 123-24 (1935); *Dorl* v. *C.I.R.*, 507 F.2d 406 (2d Cir. 1974); *Walsonavich* v. *United States*, 335 F.2d 96 (3rd Cir. 1964). As previously mentioned neither the Service investigators or agents of any other federal agency have the authority to relieve these petitioners of the mandatory consequences of deportation which results from their heroin convictions. Further, only the district Director of the Service could bind that agency into ac-

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* Petitioners state at page 9 of their brief that once Lai testified as to these events it was incumbent upon the Service to refute this testimony. The record indicates that Lai's testimony, admitted over the continued objection of the Service, was entered in the record solely for the purpose of establishing a record which Lai could utilize in presenting a claim for non-priority status to the District Director (L. 7, 8). Having established this purpose before the admission of Lai testimony, it was unnecessary for the Service attorney to refute Lai's testimony. In addition since that testimony was not properly a part of the deportation proceeding under Section 242 of the Act, the petitioners estoppel argument is not properly before this Court on a petition for review filed pursuant to Section 106 of the Act, 8 U.S.C. § 1105a.

cording these aliens non-priority status.* Even if Lai's allegation regarding an agreement are true, these petitioners had no right to rely on the mere representations of minor agency officers whose actions as described by the aliens would clearly have been beyond their authority. See also *United States ex rel. May Wing Yin* v. *Murff*, 167 F. Supp. 828, 831 (S.D.N.Y. 1958). Compare *Geisser*, *supra* at 871 where federal attorneys in charge of the action entered into an agreement which the Court indicated might bind the government.

Finally, it is submitted that neither of the petitioners have demonstrated detrimental reliance which is a requisite element in the doctrine of equitable estoppel. *Dorl*, *supra*. *Tang* v. *Immigration and Naturalization Service*, 298 F. Supp. 413, *affirmed*, 433 F.2d 1311 (9th Cir. 1970). The petitioners, having been convicted of a deportable narcotics offense, have no right to remain in the United States. Their orders of deportation are consistent with national policy and mandated by reason of Section 241(a)(11). In short, they have failed to demonstrate how the alleged representations by government agents led to any detrimental reliance. Compare *Corniel-Rodriquez*, *supra*.

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* We note that even prior to the petitioners release from incarceration these aliens have been continuously represented by counsel who is well versed and experienced in immigration law and procedure. The aliens cannot be heard to complain therefore that they were misled by their ignorance or the affirmative acts of government representatives. Compare *Corniel-Rodriquez* v. *Immigration and Naturalization Service*, Docket No. 75-4096 (2d Cir. March 22, 1976).

CONCLUSION

The petition for review should be dismissed.

April 6, 1975
New York, New York

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the Respondent.

THOMAS H. BELOTE,
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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 75-4229
CA 75-4251

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the
12th day of April, 1976 she served two copys of the within Respondent's Brief

by placing the same in a properly postpaid franked envelope addressed:

Fried, Fragomen & Del Rey, P.C.
515 Madison Avenue
New York, New York 10022

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this
12th day of April, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977